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No. 94-749

In The

Supreme Court of the United States

October Term, 1994

JOHN J. HURLEY, *et al.*,

Petitioners,

v.

IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Petitioners.

SUMMARY OF ARGUMENT

This case is *not* an example of the simmering conflict between anti-discrimination laws and constitutional rights. Instead, it is truly about the content of speech. The state courts concluded that the Veterans violated the law by excluding from their parade a message they found disagreeable. Based upon their understanding of the "proper" content of speech, the state courts forced the Veterans to include this message in their own expression.

The Superior Court, affirmed by the Massachusetts Supreme Judicial Court, erroneously equated the Veterans' decision to exclude a particular message ("message discrimination") with a decision to exclude individuals bearing a statutorily protected characteristic ("trait discrimination"). This conflation is simply wrong: it is possible to care about the message but not about the messenger, and the reverse is equally true.

This erroneous equation of two distinct kinds of actions has profound constitutional implications. Banning message discrimination, even in the guise of banning trait discrimination, is patently unconstitutional. Individuals have a virtually unqualified First Amendment right to exclude from their speech messages with which they disagree. Permissible limitations upon that right do not include the content-based regulation the Superior Court imposed. In any event, an individual need not be engaged in expression or in expression with a unified theme to possess these freedoms, contrary to the state courts' decisions.

Even if one views this dispute as a "trait discrimination" case, the Superior Court's order nonetheless violates the First Amendment. Given the virtually unlimited other opportunities for speech that GLIB possesses, no "compelling necessity" requires forcing the Veterans to include GLIB's particular message in their parade. Moreover, the state courts' chosen remedy is not the least restrictive means of advancing the public accommodation statute's stated objectives, which would be served by permitting individual GLIB members to march without proclaiming their message. In light of the severe burden upon the Veterans' free speech rights, this Court should reverse the judgment and remand the case for entry of an order rendering judgment for the Veterans on the claims against them.

ARGUMENT

I. THE STATE COURTS' PROHIBITION OF "MESSAGE DISCRIMINATION" VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

A. The State Courts Erroneously Equated Message Discrimination with Trait Discrimination.

The Superior Court concluded that the Veterans violated the Massachusetts public accommodation statute, Mass. Gen. L. ch. 272, §§ 92A, 98, by excluding GLIB on account of its message. The court brought such "message discrimination" within the scope of the statute by simply *equating* it with "trait discrimination." The court revealed this erroneous equation of two distinct forms of "discrimination" in a number of ways.

Most directly, both the Superior Court and the Supreme Judicial Court declared that rejecting certain messages is tantamount to engaging in forbidden trait discrimination:

> The judge found that excluding groups with sexual *themes* was itself a form of discrimination in violation of the public accommodation law's prohibition against discrimination based on sexual orientation.

Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, 418 Mass. 238, 242, 636 N.E.2d 1293, 1295 (Mass. 1994) (emphasis added).[1] The court was *not* contending

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[1] The Superior Court stated that "[e]xcluding all sexual *themes* . . . is a form of discrimination itself. Consequently, the Veterans' exclusion of GLIB under the guise of excluding all groups with sexual *themes* violates the public accommodations law's prohibition on sexual orientation discrimination." Petition

that excluding sexual themes was a *pretext* for sexual orientation discrimination, but rather that such "theme discrimination" *is* sexual orientation discrimination.

This failure to distinguish between constitutionally protected message discrimination and generally proscribable[2] trait discrimination also appears in the following: "The defendant's final position was that GLIB would be excluded because of its values and its message, *i.e.*, its members' sexual orientation." Pet. App. at B4 n. 5. The court simply equated exclusion on the basis of a message with exclusion on the basis of the messengers' sexual orientation.

The Superior Court's confusion of message discrimination and trait discrimination is evident in many other parts of its opinion. In referring to the Veterans' earlier exclusions of the Ku Klux Klan and an anti-busing group, the court distinguished those exclusions *not* on the ground that they were message-based and that the GLIB exclusion was not, but rather on the ground that the messengers in those cases did not happen to bear a trait protected by the anti-discrimination statute. Pet. App. at B7. In other words, the court's reasoning suggests that messages can be excluded when the messengers are not

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for Writ of Certiorari, Appendix B, (hereinafter "Pet. App.") at B4 n. 6 (emphasis added).

[2] There are, however, numerous situations in which prohibitions on sexual orientation discrimination would violate the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb *et seq.* (West Supp. 1994), and state constitutional provisions.

protected minorities; when the messengers are protected minorities, message discrimination is impermissible.

The apparent presence of heterosexuals in GLIB's membership ranks is also significant. (Pet. App. at B3). Given that the Veterans accordingly excluded some heterosexuals by excluding GLIB, labeling that decision "sexual orientation discrimination" makes sense only if message discrimination and trait discrimination are equated. Relatedly, the state courts focused exclusively on the rejection of GLIB *as an organization* rather than of GLIB's homosexual and bisexual members. *See, e.g.*, 418 Mass. at 242, 636 N.E.2d at 1295. Given the Superior Court's findings that GLIB was "formed to march" in the parade and that all three of its purposes were expressive (Pet. App. at B3), the courts' focus on the exclusion *of GLIB* further reveals their identification of sexual orientation discrimination with message discrimination.

The sense that this case is about the content of the parade rather than sexual orientation discrimination pervades the Superior Court's opinion. GLIB itself asserted that the Veterans (in cooperation with the City) violated their free expression rights by excluding them from the Parade. 418 Mass. at 245, 636 N.E.2d at 1297; Pet. App. at B1-B2. If GLIB itself believed that its message had nothing to do with the exclusion, it would have asserted its claims solely under the equal protection clause and the non-discrimination statute. By asserting a free expression claim, GLIB conceded that its message motivated the exclusion.

The essential thrust of the court's reasoning was that the Veterans could not exclude GLIB's message given that

it had permitted so many other messages into the parade. The court stated that "[t]he Veterans have always opted for heterogeneousness" of messages and that "the Veterans [had] fail[ed] to circumscribe the marchers' message." Pet. App. at B25. In describing the parade, the court focused upon its "diverse" "viewpoints," "myriad themes," and "eclectic" "messages." Pet. App. at B24.

The court's preliminary injunction, in addition, had little to do with sexual orientation and very much to do with GLIB's speech. The court required GLIB members to wear identifying badges or insignia, dictated the manner in which GLIB's speech would occur ("a single cloth banner carried at waist level"), prohibited the carrying of placards and posters, and prohibited the distribution of literature. Pet. App. at B26.

In short, the courts revealed, both directly and indirectly, that the Veterans violated the public accommodation statute by excluding a *message* (regardless of the messenger's orientation).

B. The Superior Court's Order Imposes Severe Restraints Upon the Veterans' Constitutionally Protected Right to Engage in Message Discrimination.

1. The First Amendment Prevents the State from Forcing Citizens to Adopt Unwanted Messages.

This Court has repeatedly recognized that the First Amendment encompasses "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed.

2d 752 (1977) (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34, 63 S. Ct. 1178, 1183, 87 L. Ed. 1628 (1943)). *See also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 797, 108 S. Ct. 2667, 2678, 101 L. Ed. 2d 669 (1988) (freedom of speech comprises "the decision of both what to say and what *not* to say"). Individuals have a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable." *Wooley*, 430 U.S. at 714, 715.[3] The government may not "require an individual to participate in the dissemination of an ideological message." *Id.* at 713. *See also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233, 97 S. Ct. 1782, 1798, 52 L. Ed. 2d 261 (1977).

The state courts' action involves the same constitutional evil identified in these and similar cases. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974), this Court recognized that the "right of access" statutes at issue impermissibly skewed the content of public debate, observing that the statute would encourage newspapers to take a "safe course" and "avoid controversy" when discussing political candidates. 418 U.S. at 257, 94 S. Ct. at 2839. Likewise, in *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 588 (1985), this Court invalidated an administrative order requiring a utility to

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[3] *Cf. Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, No. 93-1201 (May 31, 1994) (O'Connor, J., dissenting from denial of petition for writ of certiorari) ("it is not clear that [government-subsidized organizations] should have any less right to exclude people from their events than any other public forum user would have to exclude others from its rally or parade").

include rebuttals to the newsletters included in utility bills. The order created strong incentives for the utility to alter its speech, forcing it "to respond when there is strong disagreement with the substance of [the rebuttals]." 475 U.S. at 15 n. 11, 106 S. Ct. at 911 n. 11 (plurality opinion).

In this case, the courts' action similarly skews the content of speech. As in *Pacific Gas*, it effectively forces parade sponsors to respond to GLIB's message. The lower courts held that GLIB's access turns on the allegedly unfocused nature of the parade's message. 418 Mass. at 243, 244, 249-50; 636 N.E.2d at 1295, 1296, 1299. This reasoning suggests that the Veterans can avoid fostering GLIB's message if they craft the parade's message to contradict GLIB's speech.

This Court in *Tornillo* and *Pacific Gas* anticipated that compelling additional speech would skew the content of the speaker's original message. That specter has materialized in this case. Since the time the Supreme Judicial Court issued its opinion, the Veterans have indicated that their 1995 parade will specifically protest the courts' effort to compel inclusion of GLIB in its 1994 parade.[4] Given these changes, and the outright cancellation of the 1994 parade, it cannot be doubted that the courts' actions have caused the Veterans to alter the content of their speech. Therefore, the state courts' judgment invades the

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[4] The Veterans successfully sought a declaratory judgment in federal district court that the changed content of their parade mandates a different result. *South Boston Allied War Veterans Council v. City of Boston*, 1995 WL 40641, 1995 U.S. Dist. LEXIS 709, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995).

" 'individual freedom of mind' " no less than did the unconstitutional statute in *Wooley*. 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637). This kind of "forced response is antithetical to the free discussion that the First Amendment seeks to foster." *Pacific Gas*, 475 U.S. at 16, 106 S. Ct. at 911-12 (citing *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 559, 105 S. Ct. 2218, 2230, 85 L. Ed. 2d 588 (1985)).

The fact that the Veterans themselves are not compelled actually to mouth GLIB's message does not render the courts' orders constitutional. This Court's cases have rejected any such requirement. In both *Pacific Gas* and *Tornillo*, the compelled speech originated with a third party. *Pacific Gas*, 475 U.S. at 6-7, 106 S. Ct. at 906-907; *Tornillo*, 418 U.S. at 244 n. 2, 94 S. Ct. at 2833 n. 2 (statute requires newspaper to provide right of reply by political candidate). Moreover, as stated in *Wooley*, constitutional problems arise when the government forces one "to be an *instrument*" for promoting a particular message. 430 U.S. at 715, 97 S. Ct. at 1435 (emphasis added). The Constitution is offended when an individual is required "to *participate* in the dissemination of an ideological message." 430 U.S. at 713, 97 S. Ct. at 1434 (emphasis added). Therefore, compelling the Veterans to include GLIB's message in their parade violates their rights even though spectators might understand that the Veterans disagree with GLIB's message.

2. This Right Is Not Contingent Upon Engaging in Expression or Upon Engaging in Expression with a Unified Theme.

The Superior Court chose not to address the Veterans' assertion that forcing them to include GLIB in their parade violated their free speech rights, analyzing only their distinct argument that the state's action impaired their right of expressive association. *See* Pet. App. at B23-25. The Superior Court rejected the expressive association argument on the improbable ground that the parade was not expressive activity and thus that the Veterans' right of expressive association was not implicated.

On appeal, the Veterans protested to the Supreme Judicial Court that the trial court had bypassed their free speech argument. 418 Mass. at 249, 636 N.E.2d at 1298-99. Remarkably, the Massachusetts high court held that this right, like the expressive association right, was not available unless the Veterans could prove that they were engaged in expressive activity. 418 Mass. at 249, 636 N.E.2d at 1299. Seizing on the Superior Court's conclusion that the parade was *not* expressive activity, the state high court concluded that the Veterans' free speech rights were not even in issue. 418 Mass. at 249-51, 636 N.E.2d at 1299-1300.

The Supreme Judicial Court's contention that one must be engaging in speech to avoid government-compelled speech is a marked departure from First Amendment precedent and a dangerous constriction of constitutional liberties. None of this Court's compelled speech cases supports or even suggests such a concept.

Indeed, in one of the leading cases in this area, *Wooley v. Maynard*, the availability of the right was plainly not contingent upon being engaged in expression. The State of New Hampshire could not force the Maynards to display the "Live Free or Die" motto on their automobile license plate, despite the fact that they were not otherwise engaged in expression. Americans are free from forced expression, not just from forced dilutions of their own speech.

Contrary to the contention of the Supreme Judicial Court, this Court's decision in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 83 L. Ed. 2d 221 (1984), simply does not hold that one must be engaging in expressive activity to possess First Amendment rights. That case stands for the narrower proposition that when a party claims that a government regulation impedes affirmative efforts to engage in expression, he or she must first establish that the activity in which he or she is engaging actually constitutes expression. 468 U.S. at 293 n. 5, 104 S. Ct. at 3069 n. 5.[5] This principle has no application to a compelled speech case, where there may not be a "person desiring to engage in assertedly expressive conduct." 468 U.S. at 293 n. 5, 104 S. Ct. at 3069 n. 5. The inapplicability of this aspect of *Clark* is simply one manifestation of the difference between "typical" free speech and compelled speech cases.

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[5] The Court made this statement in the context of determining whether overnight sleeping in a public park was expressive activity.

The freedom from compelled speech is available to those engaging in speech without a unified theme. The state courts concluded that the Veterans had no First Amendment rights because their parade was "eclectic," including "myriad themes" and contradictory messages. Pet. App. at B24; 636 N.E.2d at 1296, 1299-1300. The idea that a unifying theme is a prerequisite to possessing First Amendment rights is without precedent.

Miami Herald Publishing Co. v. Tornillo, is instructive in this regard. In *Tornillo,* this Court struck down Florida's "right of reply" statute, which compelled newspapers to provide "equal space" to political candidates they had criticized. 418 U.S. at 258, 94 S. Ct. at 2839-40. In many ways, the parade at issue in this case (as seen by the state courts) is like an op-ed page in a newspaper. Both address a variety of subject matters. Both provide a private arena for diverse messengers to espouse their views. Both contain contradictory opinions. *Tornillo* flatly contradicts the ungrounded notion that the availability of First Amendment rights depends upon engaging in monothematic speech.

Accordingly, the courts' order did implicate the Veterans' First Amendment rights, contrary to the state courts' determination.

C. The Stated Government Interest Behind the Superior Court's Order is Impermissibly Content-Based.

Given that the state courts consciously outlawed "message discrimination," it is not surprising that they articulated a government interest directly related to the

content of speech. Expressing its distaste for the Veterans' exclusion of GLIB's message, the Superior Court declared the purpose behind its proscription of message discrimination: "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." Pet. App. at B24. The court later declared that "[i]nclusiveness should be the hallmark of their parade." *Id.* at B28.

The Superior Court's effort to alter the content of the parade constitutes impermissible content-based regulation of speech. *Cf. New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) ("the City has attempted to change the message of the Parade and the way that message would be conveyed"). Most cases in this area pit free speech interests against government interests unrelated to the content of speech. This reflects the fortunate American circumstance that governments rarely deliberately attempt to suppress speech; most cases arise from the incidental impact on speech of regulations designed to achieve some other purpose.

This is not such a case. On a superficial level, admittedly, it appears as such: one could argue that this case involves the application of a content-neutral nondiscrimination statute having incidental effects on speech. Yet, as demonstrated above, the state courts' action amounts to a markedly different law, one that forbids the operators of public accommodations from excluding messages they dislike. And the courts have done so for a content-based reason: to achieve their idea of what the St. Patrick's Day parade should be.

There cannot be a clearer violation of the Free Speech Clause than when the government, in order to achieve a content-based objective like "diversity," forces a citizen to engage in unwanted speech. As this Court has repeatedly recognized, content-based regulations are anathema to First Amendment values.

For example, the Court struck down Florida's well-intentioned but conscious effort to shape the flow of information to its citizens. *Tornillo*, 418 U.S. at 258, 94 S. Ct. at 2839-40. Similarly, in *Pacific Gas*, 475 U.S. at 21, 106 S. Ct. at 914 (plurality op.), this Court invalidated a statute purporting to "advance free discussion" by shaping the content of information accompanying utility bills. A "content-based regulation" designed to increase the amount of information received by potential donors to charities also did not survive constitutional scrutiny. *Riley*, 487 U.S. at 798, 108 S. Ct. at 2678. Where the government directly regulates the content of speech, "the constitutional inquiry is not qualified by any analysis of governmental interests. . . . It is enough if the individual simply expresses unwillingness to be associated with" speech with which he or she disagrees. *Roberts v. United States Jaycees*, 468 U.S. 609, 683, 104 S. Ct. 3244, 3260, 82 L. Ed. 2d 462 (1984) (O'Connor, J., concurring).

In sum, the state courts' efforts to promote "inclusiveness" in the Veterans' parade falls squarely outside the scope of permissible government regulation of speech. "[T]he State cannot advance some points of view by burdening the expression of others." *Pacific Gas*, 475 U.S. at 20, 106 S. Ct. at 914 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86, 98 S. Ct. 1407,

1420-21, 55 L. Ed. 2d 707 (1978); *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612, 649, 46 L. Ed. 2d 659 (1976)).

II. THE STATE COURTS VIOLATED THE FIRST AMENDMENT EVEN IF ONE VIEWS THIS AS A "TRAIT DISCRIMINATION" CASE.

A. The Veterans' Constitutional Rights Remain Severely Impaired.

As discussed above, there are two ways of viewing this case: as a deliberate government effort to promote the content-based objective of "inclusiveness" by prohibiting the Veterans from excluding GLIB's message *or* as the incidental effect on speech of a non-discrimination requirement facially unrelated to the content of expression.

Regardless of how one views this case, however, the burden upon the Veterans' free speech rights remains the same. That the state courts forced the Veterans to include GLIB's message in their parade is inescapable. The substantiality of this burden turns neither upon the character of the rule the Veterans allegedly violated (the judge-made rule prohibiting message discrimination or the legislative rule prohibiting trait discrimination) nor upon the nature of the underlying government purpose (to achieve "inclusiveness" in the dissemination of messages or to afford access to a public accommodation by individuals possessing a protected trait).

Accordingly, however this Court views the instant case, it must determine whether this imposition on constitutional rights is permissible.

B. No "Compelling Necessity" Justifies the Burden Placed Upon the Veterans' Rights.

1. Government Actions That Alter the Content of Speech Must Be Justified by a "Compelling Necessity."

Recognizing the foundational importance of free speech, this Court has declared that state-mandated alterations to the content of speech shall be invalidated "absent compelling necessity." *Riley v. National Fed'n of the Blind*, 487 U.S. at 800, 108 S. Ct. at 2681. *See also Sable Communications v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L. Ed. 2d 93 (1989).

First Amendment principles are devalued when a wide range of government interests are deemed "compelling" or "compellingly necessary." *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2233 (1993) ("[t]he compelling interest standard . . . is not 'water[ed] . . . down' but 'really means what it says' ") (Free Exercise Clause context) (citing *Employment Div. v. Smith*, 494 U.S. 872, 888, 110 S. Ct. 1595, 1605, 108 L. Ed. 2d 876 (1989)). "[T]he government's asserted interest must be truly paramount: . . . 'only those interests *of the highest order* can overbalance legitimate claims' " of constitutional rights. *Swanner v. Anchorage Equal Rights Comm'n*, 63 U.S.L.W. 3345 (U.S. Oct. 31, 1994) (No. 94-169) (Thomas, J., dissenting from denial of petition for writ of certiorari) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

This Court, particularly in the free speech area, has resisted the temptation to accept an overbroad range of

asserted interests as "compellingly necessary" abridgements of expression. *See, e.g., Riley,* 487 U.S. at 798-801, 108 S. Ct. at 2678-80 (preventing fraud in charitable donation solicitation not compellingly necessary); *Pacific Gas,* 475 U.S. at 19-20, 106 S. Ct. at 913-14 (plurality op.) (exposing ratepayers to a variety of views not compellingly necessary); *Wooley,* 430 U.S. at 714, 97 S. Ct. at 1435 (enhancing ability to identify passenger vehicles and promoting state pride not compellingly necessary); *Tornillo,* 418 U.S. at 258, 94 S. Ct. at 2839-40 (ensuring that wide variety of views reach public not compellingly necessary).

As demonstrated below, the state has not demonstrated that its asserted interest behind forcing the Veterans to foster GLIB's message is so compellingly necessary that it justifies the substantial infringement of the Veterans' constitutional rights.

2. The Government Has Not Demonstrated That Its Interest in Including GLIB in the Veterans' Parade Is Compelling.

The substantial imposition on the Veterans' First Amendment rights in this case is not justified given the many opportunities GLIB has to proclaim its message. In addition, Massachusetts' treatment of sexual orientation in other contexts reveals that eradicating discrimination on that basis is not a compelling government interest.

The essential function of a statute like ch. 272 is to ensure that access to the goods and services offered by public accommodations does not depend upon irrelevant characteristics. The "good" offered by a parade sponsor is

the opportunity for speech. Unlike many of the other goods and services provided by more traditional public accommodations, the opportunities for speech are abundant for GLIB. GLIB is not exclusively or even primarily at the mercy of anyone holding a virtual monopoly on a scarce resource. GLIB could sponsor its own parade, hold rallies in public parks, or distribute literature, among other things. *See Dinkins*, 814 F. Supp. at 363 (excluded gay and lesbian group sponsored own parade); *South Boston Allied War Veterans Council v. City of Boston*, 1995 WL 40641, 1995 U.S. Dist. LEXIS 709, C.A. No. 94-11402-MLW (D. Mass. Jan. 17, 1995) (noting GLIB's alternatives to marching in Veterans' parade).

In short, GLIB will still be able to proclaim its message even if the Veterans are permitted to exercise their First Amendment right to exclude the group's message. This undeniable fact undermines any argument that a "compelling necessity" justifies the lower courts' interference with the Veterans' rights.

In addition, given Massachusetts' treatment of sexual orientation in other contexts, its asserted interest in eliminating discrimination on the basis of sexual orientation is not compelling. The Massachusetts Declaration of Rights does not include sexual orientation in its list of individual characteristics entitled to equal protection: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Mass. Const. Pt. 1, Art. 1.[6]

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[6] The provision prohibiting discrimination on the basis of sexual orientation was added to Massachusetts' anti-discrimination laws only six years ago and is limited to the context of employment, housing, credit, and public accommodations. *Sex*,

Similarly, Massachusetts does not recognize same-sex marriage. *See* 1989 Mass. Acts 516, § 19; *see generally* Mass. Gen. L. ch. 207, 209 (1987 & Supp. 1994). A host of consequences flow from this fact, all of which demonstrate that protecting sexual orientation is not a compelling government interest. Available only to those involved in a marriage relationship are the right to use the homestead, Mass. Gen. L. ch. 188, §§ 3-4, rights to dower or curtesy, *id.* ch. 189 § 1, and rights to an allowance upon the death, *id.* ch. 196, absence, *id.* ch. 200, § 10, or mental incapacitation, *id.* ch. 201, § 43, of the spouse. That all of these rights turn upon an implicit distinction between heterosexual marriages and same-sex relationships strongly suggests that eradicating sexual orientation discrimination is not a compelling government interest.

On the national level, even supporters of Massachusetts' homosexual rights legislation concede that there is no consensus on this issue. *A Critical History* at 556. The vast majority of states have not enacted similar legislation. *Id.* at 626. Given these facts, it is implausible to

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Lies, and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill, 26 Harv. C.R.-C.L. L. Rev. 549, 559 (1991) (hereinafter *"A Critical History"*). *Cf. Swanner v. Anchorage Equal Rights Comm'n*, 63 U.S.L.W. 3345 (U.S. Oct. 31, 1994) (No. 94-169) (Thomas, J., dissenting) (eliminating race discrimination a compelling government interest given that " '[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit social segregation and discrimination' ").

argue that the imposition on the Veterans' rights is necessitated by a compelling state interest. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

Only the Superior Court considered the question whether a compelling government interest undergirds the application of the statute to the Veterans' exclusion of GLIB's message. It concluded that any infringement upon the Veterans' First Amendment rights was "justified by the State's interest in eradicating sexual orientation discrimination." Pet. App. at B25. In support of this conclusion, the Superior Court cited two cases not involving sexual orientation discrimination, *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

Those cases do not support the conclusion that the imposition on the Veterans' rights is justified by a compelling government interest. First, these cases did not involve sexual orientation. Second, neither *Roberts* nor *Rotary International* involved a substantial impairment of constitutional rights (there, of intimate association and expressive association). *Roberts*, 468 U.S. at 621-22, 626, 104 S. Ct. at 3251, 3254; *Rotary Int'l*, 481 U.S. at 547, 548, 107 S. Ct. at 1947. In contrast, the Veterans are forced to participate in the promulgation of a message with which they disagree, something this Court has long deemed a serious interference with free speech rights. *See Riley v. National Fed'n of the Blind*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988); *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 588 (1985); *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 1435, 51 L. Ed. 2d 752 (1977); *Miami Herald Publishing Co.*

v. Tornillo, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974).

Moreover, significant differences between race and gender on one hand and sexual orientation on the other reveal the impropriety of deeming the state's interest in this case to be compelling. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 Notre Dame L. Rev. 393 (1994). In concluding that the government's interest in eliminating race discrimination, for example, outweighs free exercise rights, this Court described the extraordinary nature of race discrimination: "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination. . . . " *Bob Jones Univ. v. United States*, 461 U.S. 574, 595, 103 S. Ct. 2017, 2030, 76 L. Ed. 2d. 157 (1983). Some of this Court's most historic decisions involve race discrimination, *see, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and "[a]n unbroken line of cases . . . establishes beyond doubt this Court's view that racial discrimination . . . violates a most fundamental national public policy, as well as rights of individuals." *Bob Jones*, 461 U.S. at 593, 103 S. Ct. at 2029. Obviously, similar statements about the issue of sexual orientation would be patently untrue.[7]

Furthermore, a conclusion that prohibiting sexual orientation discrimination is a compelling state interest

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[7] Indeed, this Court has determined that there is no fundamental right to engage in homosexual behavior. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

would have a dramatic impact upon numerous areas of the law, including religious liberty. Under the test articulated by the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb *et seq.* (West Supp. 1994), substantial burdens upon religious exercise pass statutory muster only if justified by a compelling government interest pursued through narrowly tailored means. *Id.* at § 2000bb-1.

Given that the orthodox forms of this nation's three major religions (Christianity, Judaism, and Islam) condemn homosexuality and structure church teaching and discipline accordingly, a conclusion that eliminating sexual orientation discrimination is a compelling government interest would pose a dangerous threat to religious liberty. In short, the subordination of free speech might lead inexorably to the devaluing of the free exercise of religion. Each of these results is inconsistent with our historic constitutional values.

C. In Any Event, the Superior Court's Order is Not the Least Restrictive Means of Achieving the Government's Interest.

Even if this Court concludes that a compelling government interest moved the state courts to impair the Veterans' free speech rights, it is nonetheless necessary to determine whether the state's chosen remedy is narrowly tailored to attaining that end. *Riley v. National Fed'n of the Blind*, 487 U.S. at 800-801, 108 S. Ct. at 2679-80; *Pacific Gas*, 475 U.S. at 19, 106 S. Ct. at 913 (plurality op.) (state may pursue compelling government interest only "through means that would not violate . . . First Amendment

rights"). *See also Roberts*, 468 U.S. at 628-29, 104 S. Ct. at 3255 (government can abridge "no more . . . freedom than is necessary to accomplish [its] purpose").

If one concludes that this case is really "about" trait discrimination rather than message discrimination, then the state courts' remedy is inescapably overbroad. A law arguably requiring access to a parade by individuals bearing a statutorily protected trait does not confer upon them the unfettered right to engage in whatever speech they desire. The statute's goals would be wholly satisfied if GLIB's members were permitted to march in the parade. Because the state courts conferred the additional right to speak freely,[8] their order is not the least restrictive means of achieving the statute's objectives.

One might respond that giving GLIB's members the right to march in the parade without proclaiming their

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[8] At one point in the Superior Court's opinion, it suggested that it was not conferring such a right: "The statute does not mandate GLIB's inclusion into the Parade; it only prevents GLIB's exclusion simply because of its members' sexual orientation." Pet. App. at B25. This suggests that the Veterans had a right to exclude GLIB for other, legitimate reasons. (Yet, given the court's finding that excluding GLIB because of its message *is* excluding GLIB because of its members' sexual orientation, the court's apparent recognition of the Veterans' rights is illusory.) However, the court's order entirely precluded them from exercising that right: "It is further ORDERED that the defendant Veterans Council *shall allow plaintiff GLIB to participate* in the Parade in the same manner and under the same terms and conditions applicable to all other participants in the Parade." *Id.* at B29 (emphasis added). GLIB thus received the rights of *participants*, preventing the Veterans from excluding them on the basis of their message.

message is like requiring a restaurant owner to admit them but not letting them order any food. Despite its superficial appeal, this analogy does not bear scrutiny. In the restaurant example, both the decision to deny access and the decision to deny food are motivated by a consideration the statute deems impermissible: the sexual orientation of the customer. In the parade example, even if one assumes that the decision to deny access is motivated solely by a characteristic the statute deems irrelevant, a desire to restrict the content of speech once access has been achieved can be (and, in this case, was) motivated by a constitutionally protected reason: the content of the message.[9] Accordingly, faithful application of the statute need not entail permitting GLIB to proclaim its gay pride message. That the state courts did so reveals the impermissible overbreadth of their remedy.

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[9] It cannot be plausibly argued that the Veterans' actions were motivated solely by the sexual orientation of GLIB's members, or, relatedly, that their apparent desire to exclude GLIB's message from their parade was simply a pretext for excluding homosexuals and bisexuals. The record reveals that the Veterans would have allowed members of GLIB to march without a banner identifying the group. 636 N.E.2d at 1304 n. 4 (Nolan, J., dissenting).

CONCLUSION

A central command of the Free Speech Clause is that government may not compel an individual or group to foster a message with which they disagree. Whether this compulsion is viewed as a means of directly achieving a content-based objective of "inclusiveness" or of indirectly advancing the goals of an anti-discrimination statute, the state courts' violation of this command is clear.

The judgment should be reversed and the case remanded for entry of an order rendering judgment for the Veterans on the claims against them.

Respectfully submitted,

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APPENDIX

STATEMENTS OF INTEREST

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* joined by many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

This case potentially involves a serious threat to religious freedom. If the Court considers the relative importance of eliminating sexual orientation discrimination, a conclusion that this objective constitutes a compelling government interest could significantly undermine the right of orthodox Christians, Jews, and Muslims to exercise their faiths in a broad range of contexts.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence

(1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

The Southern Baptist Convention (SBC) is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life Commission (CLC) is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

Family Research Council (FRC) conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

The National Association of Evangelicals is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 45,000 churches from 74 denominations and serves a constituency of approximately 15 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.